

Foster v New York City Dept. of Correction
2011 NY Slip Op 31257(U)
May 11, 2011
Sup Ct, NY County
Docket Number: 116406/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Sean B. Lobis

PART 6

Index Number : 116406/2010
 FOSTER, MAKEDA N.
 vs.
 NYC DEPT. OF CORRECTION
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE 2/25/11
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

his motion to/for _____

Petition
 Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED
1-16
X: met. 17
18

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ *Petition*

Petition
**MOTION DECIDED IN ACCORDANCE WITH
 ACCOMPANYING DECISION AND ORDER**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/11/11

JBL
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

-----X
MAKEDA N. FOSTER,

Petitioner,

Index No. 116406/10

Decision, Order, and Judgment

-against-

UNFILED JUDGMENT

NEW YORK CITY DEPARTMENT OF
CORRECTION and Department of Citywide
Administrative Services, Office of Citywide Personnel

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Respondents. -----X

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner brings this Article 78 proceeding for a judgment annulling and reversing the decision of respondent New York City Department of Correction ("DOC") to terminate her position as a probationary corrections officer, restoring her to the position, and awarding her retroactive back pay, benefits, and seniority. Respondents cross-move, pursuant to C.P.L.R. § 7804(f) and Rule 3211(a)(7), for an order dismissing the petition for failing to state a cause of action. For the reasons set forth below, the cross-motion is granted, the petition is denied, and the proceeding is dismissed.

Petitioner was first employed by DOC on August 30, 2007, as probationary corrections officer. The probationary period was supposed to last two years; however, since petitioner used a significant amount of leave time during a pregnancy, the probationary period was extended to September 11, 2010. On or about May 7, 2009, the New York City Police Department ("NYPD") informed petitioner that she had been accused of two counts of assault, endangering the welfare of a child, attempted assault, menacing, and harassment. The alleged victims were Tiffany Reid and her son. Petitioner claims that the charges were based on complaints maliciously made by Ms. Reid, who has a child with the father of petitioner's child.

In an intra-department memorandum, dated May 7, 2009, petitioner notified DOC of the charges. Four days later, she turned herself in to NYPD's 81st precinct. Petitioner was given a desk appearance ticket and instructed to appear in Kings County Criminal Court on June 16, 2009. She informed DOC of the upcoming court appearance.

At the June 16, 2009 criminal court appearance, the judge issued a temporary order of protection against petitioner and in favor of Ms. Reid and her son. The order of protection remained in effect until the conclusion of the criminal case. Throughout that time period, petitioner made numerous appearances in criminal court and kept DOC informed of the status of her case. On May 6, 2010, petitioner was arrested by NYPD detectives for an alleged violation of the temporary order of protection based on a complaint made by Ms. Reid. She was charged with criminal contempt.

By letter dated August 17, 2010, DOC informed petitioner that she would be terminated from employment effective August 18, 2010. On October 19, 2010, the criminal cases against petitioner were dismissed. According to the court transcript, the prosecutor set forth that the complaining witness was uncooperative.

After her termination, petitioner applied for unemployment benefits with the New York State Department of Labor ("DOL"). By letter dated November 1, 2010, DOL informed petitioner that DOC had "indicated that [her] separation from employment was a result of a charge, arrest and/or violation of the law." A hearing was held thereafter to determine petitioner's eligibility for unemployment benefits. According to a decision by Administrative Law Judge Yolanda Green, filed on December 2, 2010, petitioner did not commit any misconduct and she was awarded the benefits.

In support of her petition, petitioner argues that it was arbitrary, capricious, and an abuse of discretion for DOC to terminate her from employment. Petitioner acknowledges that a probationary employee, like herself, can be terminated at will as long as the termination is not made in bad faith or for an improper or impermissible reason and that dismissal due to criminal charges, which are later dropped, does not support a finding of bad faith. Petitioner further admits that the facts found by DOL's administrative law judge are not dispositive of what actually occurred regarding her alleged crimes. Nevertheless, petitioner asserts that the only possible basis for her dismissal was due to the alleged misconduct that turned out to be entirely false. Because petitioner was "blameless," she seems to assert that there is no question that DOC acted in bad faith. In the event that the court does not grant the petition, petitioner requests a trial, pursuant to C.P.L.R. § 7804(h), in order to demonstrate that she was terminated in an arbitrary and capricious manner.

In opposition, respondents cross-move to dismiss the petition for failing to state a cause of action. They argue that petitioner is required to allege that DOC terminated her in bad faith or otherwise acted illegally or improperly in terminating her. According to respondents, conclusory allegations and speculation are not enough. Here, respondents contend, petitioner has failed to allege bad faith or illegal or improper motive. Assuming that petitioner is alleging bad faith due to the termination based on the criminal charges, respondents set forth that dismissal based on criminal charges that are eventually dropped does not constitute bad faith.

On a motion to dismiss a special proceeding, "the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" In re Yan Ping Xu v. New York City Dept. of Health, 77 A.D.3d 40, 43 (1st Dep't 2010) (citation omitted). See also, e.g., In re Schwaner v. Collins, 17 A.D.3d 1068, 1069 (4th Dep't 2005); In re Y & Q Holdings (NY), Inc. v. Bd. of Mgrs. of Exec. Plz. Condo., 278 A.D.2d 173 (1st Dep't 2000).

A probationary employee “may be dismissed for almost any reason, or for no reason at all.” In re Swinton v. Safir, 93 N.Y.2d 758, 762-63 (1999), quoting In re Venes v Community School Bd. of Dist. 26, 43 N.Y.2d 520, 525 (1978). Indeed, the decision to terminate a probationary employee cannot be overturned by the courts unless the employee can demonstrate that he or she “was dismissed in bad faith or for an improper or impermissible reason.” Swinton, 93 N.Y.2d at 763 (citations omitted). A dismissal based on criminal or otherwise objectionable conduct is permissible, even if the employee is ultimately blameless. See In re Smith v. Abate, 212 A.D.2d 449, 450 (1st Dep’t 1995) (probationary employee who proffered evidence that he was unknowingly drugged the night before a urinalysis could not establish bad faith); In re Green v. New York City Police Dep’t, 235 A.D.2d 475, 476 (2d Dep’t 1997) (probationary employee could not establish bad faith even though assault charge lodged by his ex-girlfriend, which was the basis for his termination, was withdrawn); see generally In re Holmes v. Sielaff, 182 A.D.2d 557, 558 (1st Dep’t 1992). Although the court sympathizes with petitioner’s position, the court is constrained by the case law. Petitioner has alleged no facts that would support a cognizable legal theory that she was terminated in bad faith. Accordingly, it is hereby

ORDERED that the cross-motion is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: May 11, 2011



 JOAN B. LOBIS, J.S.C.

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